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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE HARTFORD ELECTRIC LIGHT COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. III, 1293)[1] is reported in 131 F. (2d) 953. The Federal Power Commission's opinions and orders (R. III, 1060, 1073; 1726, 1282) are reported in 37 P. U. R. (N. S.) 193, 201 and 44 P. U. R. (N. S.) 515, 519.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. III, 1320) was entered February 2, 1943. The

[1] The three volumes of printed record filed with the petition in this case will be referred to as R. I, R. II, and R. III, respectively.

petition for a writ of certiorari was filed on March 16, 1943. Jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*), and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, The Hartford Electric Light Company, maintains a steam electric generating plant in Hartford, Connecticut. Three circuits leading from petitioner's busses in that plant connect at the plant wall with an adjacent transmission substation owned and operated by The Connecticut Power Company ("Connecticut Power"). A transmission line leads northward from this substation to a point in Massachusetts where it interconnects with the facilities of a Massachusetts utility, the line being owned and operated in Connecticut by Connecticut Power and in Massachusetts by the Massachusetts utility. Pursuant to contract, petitioner sells electric energy to Connecticut Power to the extent of the latter's requirements in Connecticut. In addition, petitioner regularly sells Connecticut Power a substantial further amount of energy which petitioner knows is transmitted by Connecticut Power to Massachusetts for resale and ultimate consumption in that State.

The Federal Power Commission's order in the present proceeding directs petitioner to comply

with previous Commission orders under the Federal Power Act, which prescribe a uniform system of accounts for public utilities subject to the Act and call for the submission of certain cost data by such utilities. Petitioner challenges the Commission's jurisdiction over it, contending that it is not a "public utility" within the meaning of the Act.

The question presented is:

Whether petitioner owns or operates facilities for the sale or transmission of electric energy in interstate commerce within the meaning of Section 201 (b) of the Federal Power Act, and is therefore a "public utility" as defined in Section 201 (e) of the Act.

STATUTE INVOLVED

The relevant sections of the Federal Power Act are set forth in the Appendix, *infra*.

STATEMENT

The Circuit Court of Appeals affirmed orders of the Federal Power Commission whereby petitioner, The Hartford Electric Light Company, having been found to be a "public utility," was directed to keep its accounts in accordance with the accounting requirements previously prescribed by the Commission (R. II, 821, 836, 842; R. I, 18) for "public utilities" subject to the Federal Power Act.

For ten years immediately preceding passage of the Act, petitioner owned and operated facili-

ties for the transmission and sale at wholesale of electric energy in interstate commerce, through interconnections by which it interchanged electric energy with a Massachusetts electric company. Petitioner admits that it would "probably" have become subject to the Commission's regulation under the new Act (R. III, 1196, 1155–1156). However, on Sunday, August 25, 1935, the day before the Act was approved by the President, petitioner severed the interconnections at the Connecticut-Massachusetts boundary (R. I, 316–320, 339; R. II, 816–817). Petitioner further admits that this connection was severed for the sole purpose of avoiding Federal regulation (Ex. 30, Tr. 1930).[2]

Petitioner then sought an order or interpretation of the Act by the Commission which would have enabled it to resume the interstate energy transactions without becoming subject to regulations under the Act (Ex. 30, printed in part only, R. II, 809; see Tr. 1923–51). Failing in those efforts, petitioner then transferred title to its South Meadow, Connecticut, transmission substation to The Connecticut Power Company ("Connecticut Power") which it controlled (R. I, 87, 107, 46 (Hearings before Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st session, on S. 1725, April 24, 1935, pp. 497–498), and which already owned the transmission line

[2] The reference "Tr." is used to indicate pages of the Record which have not been printed.

from the substation to the Massachusetts boundary. The interstate transactions were then resumed, with Connecticut Power supplying to the Massachusetts companies electric energy which it received principally from petitioner and receiving from the Massachusetts companies electric energy which it supplied principally to the petitioner (R. I, 44, 84, 324, 326, 104, 115, 85). Physically there was no change in the electric energy transfers, and the physical scheme of operation is the same as it was before the Federal Power Act was enacted (admitted, R. III, 1136–1137; see R. I, 344, 110, 115–116, 119–120).

The electric facilities and operations involved may be described as follows:

Adjoining and interconnected with petitioner's South Meadow generating plant (R. I, 70–71) is the South Meadow transmission substation which petitioner originally owned but which it transferred to Connecticut Power (R. I, 86, 99–101, 286–288, 265). A double-circuit transmission line leads northward from the substation to Agawam, Massachusetts, where it interconnects with facilities of Turner Falls Power & Electric Company and, through them, with facilities of the New England Power Company yet farther north. There are no taps on this line between Hartford and Agawam (R. I, 98, 285, 319) and it is owned in Connecticut by Connecticut Power and in Massachusetts by the Turners Falls Power & Electric Company (R. I, 98, 101–102). The transmission

line distance to the State boundary is less than 30 miles (R. I, 285). A similar line over 60 miles long owned by Connecticut Power leads from the South Meadow substation to Falls Village in the northwestern part of Connecticut, and has a number of taps to supply substations en route (R. I, 98, 285). Energy supplied by petitioner's South Meadow plant to Connecticut Power flows out on the line to Falls Village and the line to Agawam, Massachusetts, as the loads require (R. I, 357, 324, 98, 285).

The generators in petitioner's South Meadow plant are connected to a "Main Bus" and an alternate bus in the plant by circuits made up of conductors, disconnecting switches, and oil circuit breakers (R. I, 265, 134; R. II, 819). Numerous circuits connected to those busses, including disconnecting switches and oil circuit breakers, are used in the distribution and transmission of electric energy in Hartford and to other places in Connecticut (R. I, 265, 139; R. II, 819), but there are three circuits which lead through bushings in the wall of the plant building to the adjacent substation now owned by Connecticut Power (R. I, 99, 139). Inside the plant building these three circuits are owned by petitioner, and outside the building they are now owned by Connecticut Power (R. I, 36–37). Energy delivered by petitioner over these three circuits "is measured by meters" owned by petitioner which are "connected in the bus structure inside the generating

station" (R. I, 100). Both watt meters and watt-hour meters are provided and read hourly (R. II, 819) and records of these readings are kept on log sheets (R. I, 364, 324; R. II, 820; R. I, 88–89). Outside the wall bushings each of the three circuits passes through a substation transformer [3] to the 66-kilovolt "bus" to which the Agawam and Falls Village connect.

By means of these facilities 166,144,000 kilowatt-hours of electric energy from petitioner's South Meadow steam plant were supplied to Connecticut Power in the first nine months of 1939, of which 97,932,000 kilowatt-hours (or about 59%) were sent on the Hartford-Agawam line to Massachusetts (R. II, 817). From June 1 to September 30, 1939, approximately a third of the net generation at petitioner's plant was sent to Massachusetts (R. II, 817), reaching a maximum for one hour of 62% (57% of gross, R. II, 820, plus 5% for net, R. I, 365).[4]

[3] The transformers raise the voltage from 11 to 66 kilovolts (R. II, 819; R. I, 99–101) and reduce the amperage in inverse ratio, thereby reducing the size of the copper conductors required in the line and making long distance transmission economically feasible (R. I, 134–139, 160–162, 184–185, 102; R. II, 758–759), but the intangible electric energy (ability of an electric system to do work (R. I, 508; R. II, 572; R. I, 436, 167; R. II, 678)) is not changed (R. I, 521, 147–148; R. II, 914, 916, 957).

[4] No question is raised as to the sufficiency of the energy transactions, so far as amount is concerned, to support the Commission's jurisdiction (R. III, 1124–1125).

Connecticut Power pays petitioner the incremental cost of the electric energy which it receives from petitioner (R. I, 81, 84, 333), and petitioner's sales to Connecticut Power are admittedly sales at wholesale as defined in Section 201 (d) of the Act (R. III, 1181–1182).

Petitioner admittedly knows that the amount of electric energy it sells to Connecticut Power exceeds the latter's load requirements in Connecticut and that such excess is utilized by Connecticut Power in connection with the operation of the Connecticut Valley Power Exchange and that in such operation energy is transmitted across the State boundary to Massachusetts (Supp. Ans., pars. 24, 26; R. I, 44–45, 84) where it is used (except for losses) for supplying ultimate consumers (R. I, 112–113, 114). Petitioner further concedes that the supply of energy by petitioner is essential to the operation of the Exchange R. III, 1198).

The Commission determined that petitioner was a "public utility" upon finding that petitioner owns and operates facilities, including those between its generators and the bushings in the wall of its South Meadow plant, for the sale of electric energy at wholesale in interstate commerce and for the transmission of that energy in interstate commerce (R. III, 1063); and accordingly ordered petitioner to comply with its previous orders requiring "public utilities" subject to

the Act to maintain a uniform system of accounts and to submit certain cost data concerning their plants (R. III, 1060, 1073–1074). After rehearing, granted upon petitioner's application, the Commission affirmed its previous opinion and order (R. III, 1276–1283). A subsequent application for another rehearing (R. III, 1284–1287) was denied (R. III, 1290). The Circuit Court of Appeals sustained the Commission's determination of jurisdiction on the basis of petitioner's ownership and operation of facilities for sale, and accordingly did not pass upon the Commission's findings with respect to transmission facilities (R. III, 1293–1319; 131 F. (2d) 953, C. C. A. 2d).

ARGUMENT

Section 201 (b) defines the coverage of Part II of the Act and the scope of the Commission's jurisdiction thereunder. It first provides that Part II "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." It then commits to the Commission jurisdiction over "all facilities for such transmission or sale," but not, except as specifically provided in Parts II and III, "facilities used for the generation of electric energy or * * * used in local distribution or only for the transmission * * * in intrastate commerce, or * * * for the transmission of electric energy consumed wholly by the transmitter." Section 201 (e) defines public util-

ity as "any person who owns or operates facilities subject to the jurisdiction of the Commission." Section 301 (a) requires every "public utility" to keep such accounts as the Commission may prescribe, with a specific proviso that "nothing in this Act shall relieve any public utility from keeping any accounts * * * required * * * by or under authority of the laws of any State." Section 208 authorizes the Commission to investigate the actual legitimate cost of, and depreciation in, the property of every public utility and requires such utilities to submit information concerning the cost of its property upon the Commission's request.

The court below correctly held that petitioner owned and operated facilities for the sale of electric energy at wholesale in interstate commerce, was therefore a "public utility" within the meaning of Section 201 (e) of the Act, and was thus bound to comply with orders issued by the Commission pursuant to Sections 208 and 301 (a) of the Act.

1. Petitioner concedes that its sales of electric energy to Connecticut Power are "at wholesale", within the meaning of Section 201 (d) of the Act (R. III, 1181–1182). It contends, however, that the sales are not "in interstate commerce," relying chiefly on *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390, and *Utah Power and Light Co.* v. *Pfost,* 286 U. S. 165. But the contrary holding below is correct. Petitioner not only admits knowledge that the energy it supplies is de-

livered by Connecticut Power to Massachusetts utilities, but acknowledges that the very purpose of the sales in excess of Connecticut's local requirements is to maintain the flow of electric energy from petitioner's plant to out-of-state destinations.[5] In these circumstances, and particularly since the interstate transit of the electric energy is not only continuous (cf. *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 124, 130) but practically instantaneous,[6] the sales in question are governed by the principle that "where commodities are bought for use beyond state lines, the sale is a part of interstate commerce" (*United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 568–569). *Cf. Dahnke-Walker* v. *Bondurant*, 257 U. S. 282, 290–291; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222; compare *Overstreet* v. *North Shore Corporation*, No. 284, this Term, decided February 1, 1943.

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[5] R. I, 84–87. There is thus no room here for the application of *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 394–395, where the seller's "indifferent knowledge" that the buyer contemplated interstate disposition of the goods sold was held too remote to attach such an interstate character to the sale as to prevent state taxation of the seller in connection therewith. *Cf. Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243; *United States* v. *Patten*, 226 U. S. 525, 543. Nor can there be any question here concerning the substantial nature of the sales in question. See pp. 7–8, *supra*.

[6] The flow of electricity is practically instantaneous in nature and continuously dependent upon maintenance of simultaneous consumption and generation (R. I, 331–332, 370–371, 214, 215; R. II, 1041–1042, 591).

This Court recently refused to review a case which held that a sale of natural gas at the beginning of interstate movement is a sale in interstate commerce within the meaning of the Natural Gas Act. *Peoples Natural Gas Co.* v. *Federal Power Commission,* 127 F. (2d) 153, 157–158 (App. D. C.), certiorari denied, 316 U. S. 700. Petitioner's attempted distinction,—that there the purchaser transported the gas to the state boundary and thence into the adjoining state, while here the purchaser's ownership of transmission facilities extends only to the state boundary where it "delivers" the energy for transmission into the adjoining state—is unavailing. Transfer of title or custody en route does not remove any part of an interstate movement from interstate commerce. See cases pp. 14–15, *infra.*[7]

To escape the application of these familiar principles and their unavoidable result, petitioner resorts to the language in Section 201 (a): "such Federal regulation, however, to extend only to

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[7] Petitioner's assertion that our view would "reverse" (Pet. 18) such cases as *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, upholding a state tax on electrical generation, and *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, sustaining a state occupation tax on the business of mining ores, is unfounded.

The *Utah Power and Light Co.* and *Oliver Iron Mining Co.* cases were concerned solely with production and not sale. Thus neither case provides any answer to the question whether a sale at the beginning of the interstate transmission is a sale "in interstate commerce" within the meaning of the Federal Power Act.

those matters which are not subject to regulation by the States". Petitioner claims that this was intended to be the criterion of what constitutes interstate commerce regulable under the Act; and, therefore, that the determinative question, which it asserts must be answered in the affirmative, is whether the transactions in question were subject to the jurisdiction of the "Connecticut Commission". (Pet. 20). But Section 201 (a) is of no aid to petitioner, even accepting *arguendo* the premise inherent in petitioner's contention that its general declaratory provisions override the specific regulatory provisions of the Act. The meaning of the proviso is fundamentally a question of legislative intent which, so far as legal principles are involved, must be determined in accordance with Congress' understanding of the law at the time of enactment. *Cf. Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 248–250. Like the legislation in the *Parker* case, the statute at bar was primarily de-

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Moreover, petitioner's reliance on these cases overlooks the traditional recognition that "enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce" (*Kirschbaum* v. *Walling*, 316 U. S. 517, 521). See also *Swift & Co.* v. *United States*, 196 U. S. 375, 400; *Stafford* v. *Wallace*, 258 U. S. 495, 525; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311. The fact is that state taxation of the very instrumentalities of interstate commerce is historically permissible. See, e. g., *Adams Express* v. *Ohio*, 165 U. S. 194, 220; *Southern Railway* v. *Watts*, 260 U. S. 519, 530.

signed to close a regulatory gap revealed by judicial decision—in this instance *Public Utilities Comm.* v. *Attleboro Co.*, 273 U. S. 83.[8] The pertinency of that decision to the transactions here in issue is not affected by the intervention of Connecticut Power between petitioner and the out-of-state purchasers. It was well established at the time of that decision that the interstate character of particular commerce was not affected by such circumstances as the transfer of title or custody in the originating state or en route (cf. *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 130; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 526; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 280-281; *Peoples Gas Co.* v. *Public Service Commission*, 270 U. S. 550, 554) or the mingling

[8] "The decision in the Supreme Court in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States." S. Rep. No. 621, 74th Cong., 1st Sess., on S. 2796, p. 17. Cf. *ibid.* p. 48. See also H. Rep. No. 1318, 74th Cong., 1st Sess., on S. 2796, pp. 7–8; Hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st Sess., on S. 1725, pp. 250, 767, 800; Hearings before the House of Representatives, 74th Cong., 1st Sess., on H. R. 5423, pp. 384, 436, 497–498, 1340, 1614, 1656–1657, 2144.

It is thus immaterial whether as an original question the *Attleboro* case would be decided the same way today. Compare *Parker* v. *Brown*, No. 46, this Term, decided January 4, 1943.

of the subjects of interstate commerce with those of intrastate commerce (*Peoples Gas Co.* v. *Public Service Commission, supra,* at 554–555; Cf. *Cooney* v. *Mountain States Telegraph & Telephone Co.,* 294 U. S. 384, 391–394; *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133). Consequently, even adopting the most restrictive view of Section 201 (a) with respect to the scope of federal jurisdiction, petitioner is engaged in the sale of electric energy in interstate commerce within the meaning of the Federal Power Act.[9]

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[9] As shown by the brief and oral argument for respondent in Nos. 299 and 329, this Term, argued January 4–5, 1943, reargued March 4–5, 1943, we are of the opinion that Section 201 (a) should not be construed to narrow the scope of the federal regulation expressly provided for in the succeeding regulatory provisions.

That Congress did not intend to make the mere fact that there is a State law or State commission regulation of a particular matter a basis for exempting such matter from the Federal Power Act is shown by the elimination by the Conference Committee (Conference Report, House of Representatives, Report No. 1903, 74th Cong., 1st sess., on S. 2796, August 23, 1935, p. 75) of an additional subsection (b) to Sec. 318, which had been adopted in the House (Congressional Record, Vol. 79, Part 10, pp. 10574–10575, 74th Cong., 1st sess., July 1, 1935). That amendment provided:

> "If, with respect to the issue, sale, or guaranty of a security, the method of keeping accounts * * * or any other requirement of this part or the next preceding part * * * any person is subject to the law of any State or regulation by a State commission, such person shall not be subject to the requirements of this part or the next preceding part * * * with respect to the same subject matter."

Indeed, any other conclusion would be inconsistent with the fundamental purpose of the Act to provide for federal rate regulation in the gap revealed by the *Attleboro* decision.[10] The Commission's unquestioned jurisdiction to fix rates for Connecticut Power's resale of the energy in question (Section 206 (a)) would be emasculated if it were denied control over the wholesale rates which petitioner charges Connecticut Power for the same energy.

2. Petitioner contends that it is not a "public utility" under the Act because it allegedly owns

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[10] The legislative history of the Act is clear that a sale at wholesale in interstate commerce when the sale was made by the producer is not thereby exempt. Mr. John E. Benton, General Solicitor of the National Association of Railroad and Utilities Commissioners, testifying at the hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st sess., on H. R. 5423, said (p. 1622):

> The States * * * cannot reach the interstate *producer* supplying the distributing company.
>
> The rates fixed in these wholesale transactions necessarily affect the rates to consumers. They are wholly unregulated. The State commissioners favor the filling of this gap by well-considered legislation enacted by Congress, which is the only body that can legislate. [Emphasis supplied.] (See also his testimony to the same effect at the Hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st Sess., on S. 1725, p. 757.)

Mr. Benton expressly disclaimed before the Federal Power Commission ever having contended that Congress should not go behind the company which actually makes the transfer across the State line (R. III, 1215).

and operates no property "except its generating plant and its local distribution system" (Pet. 20), both of which it claims are placed wholly beyond the ordinary jurisdiction of the Commission by the second sentence of Section 201 (b).

But there is no difficulty in identifying facilities which, as the Commission and the court below correctly determined, are owned and operated by petitioner for its sales in interstate commerce.[11] Such facilities, in addition to generating equipment, consist of the electrical apparatus for conducting, controlling and measuring the energy sold between the generators and the wall bushings, at which point petitioner's facilities connect with

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[11] In its findings of fact, the Commission found that "Among the facilities owned and operated by Hartford and used in the sale at wholesale * * * of electric energy are the facilities from the connections on its generators to the bushings on the wall of its steam generating plants" (R. III, 1063). In its opinion, it noted further that such "physical facilities are *only some, but by no means all, of the facilities* used in the sale of electric energy. The entire corporate organization of Hartford, its contracts, its books of account, its instrumentalities for billing and collecting, as well as its electric facilities, are used in the sale of electric energy in interstate commerce" (R. III, 1070).

The entire court below found the necessary facilities for petitioner's interstate sale in its "corporate organization, contracts, accounts, memoranda, papers and other records, in so far as they are utilized in connection with such sales" (R. III, 1307–1308), and a majority of the court were further of the opinion that petitioner's "generation facilities, where used as aids to such sales, are within the Commission's jurisdiction under § 201 (b)" (R. III, 1308 *et seq.*)

Connecticut's.[12] They also include petitioner's business organization and records such as the log sheets of its meter readings. (See p. 7, *supra*.) The intervening apparatus between the generators and the wall bushings are the means by which the energy in question is delivered to the purchaser, and the business facilities the means by which the practical commercial aspects of the transaction are effected.

Petitioner contends further that all of the facilities outlined above are also used for generation and local distribution and therefore are excluded by the second sentence of Section 201 (b) from the Act's coverage (Pet. 15, 23). Petitioner's argument rests upon the presence of the word "only" in the reference to facilities used "for the transmission of electric energy in interstate commerce," and its absence from the references to facilities used for generation or in local distribution. But even if it be assumed that all the facilities in question are also used for generation and local distribution, it does not follow that

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[12] More specifically these facilities are: the circuits between the generators and the busses, including disconnecting switches and oil circuit breakers; the main and alternate busses; the circuits to the wall bushings, including disconnecting switches, oil circuit breakers, watt meters, and watt-hour meters (Pet. Ex. 2, R. I, 265; Commission Ex. 43, R. II, 819). These are facilities for the sale of electric energy in the same practical sense that a gasoline hose, valve, and measuring apparatus in a filling station are facilities for the sale of gasoline.

such facilities are thereby excluded from the Commission's jurisdiction. The second sentence of Section 201 (b) does not purport to prescribe blanket exemptions from the Commission's jurisdiction. On the contrary, it provides in terms that the facilities listed shall be subject to the jurisdiction of the Commission to the extent specifically provided in the Act. As the lower court held (R. III, 1310), one instance of such a specific provision consists in the immediately preceding grant of jurisdiction over all facilities for the sale of electric energy in interstate commerce.

Indeed, the construction advanced by petitioner would result in the anomaly that while the first sentence of Section 201 (b) makes the statute apply "to the sale of electric energy at wholesale in interstate commerce," the second sentence would limit the Commission's authority to sales effected by means of facilities used exclusively for that purpose.

Petitioner's contention would strip of significance the specific grant of jurisdiction, in the disjunctive, over facilities used for interstate sales, as distinguished from those used for interstate transmission. Moreover, evasion of the Act would become too easy. For example, even a utility operating an interstate transmission line could escape regulation simply by attaching the necessary apparatus to the line to permit some use in "local distribution." In petitioner's own case the

Act would fail of its primary purpose, the regulation of the type of wholesale transactions held beyond the reach of the states in the *Attleboro* case. In the light of the violence which such a construction would do to the specific grant of jurisdiction over interstate sales and the Congressional objective in enacting the legislation, the connotations which petitioner attaches to the placement of the word "only" in the second sentence of Section 201 (b) cannot be accepted. Cf. *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, 348–350.

The construction accorded to the Act by the court below, on the other hand, squares with the policy enunciated in Section 201 (a), declaring that "the business of transmitting and selling electric energy" is affected with a public interest—

> and that Federal regulation of matters relating to generation to the extent provided * * * and *of that part of such business* which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest * * *." [Italics supplied.]

Whether the interstate energy transactions amount to 3% of a company's production, as in the *Attleboro* case, or up to a peak of 62% as in this

case, the Federal Power Act was aimed at the necessity for the regulation of that part. It is also consistent with the familiar principle that a business partly engaged in interstate commerce may be regulated by the Federal government and that accounting requirements may properly encompass the intrastate as well as the interstate aspects. Cf. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. This was in fact contemplated by Congress in connection with Section 301 of the Power Act. See S. Rep. No. 621, 74th Cong., 1st Sess., p. 53; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 30–31.[13]

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[13] There is also an alternate ground, noted but not passed upon by the lower court, for upholding the Commission's jurisdiction. The Commission determined that petitioner was also engaged in the transmission of electric energy in interstate commerce, finding that the intervening apparatus between petitioner's generators and the wall bushings, described, *supra*, p. 6, was used for such transmission, as well as interstate sale (R. III, 1063). In the court below, petitioner challenged this holding on the ground the facilities in question are classified as part of a generating plant in the Commission's accounting rules and in any event were too small to constitute a basis for jurisdiction (R. III, 1313). The Commission's view in this connection is supported by *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, where this Court, in distinguishing between generation and transmission, said (286 U. S. at 181):

"* * * the process of transferring, as distinguished from that of producing, the electrical energy, begins * * * definitely at the generator, at which point measuring appliances can be placed and the quantum of electrical energy ascertained with practical accuracy."

CONCLUSION

The decision below is correct, and there is no conflict. The petition for certiorari should accordingly be denied.

Respectfully submitted.

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APRIL 1943.